STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF	:	
RHODE ISLAND STATE LABOR RELATIONS BOARD	:	
-AND-	:	CASE NO: ULP-5711
STATE OF RHODE ISLAND, DEPARTMENT OF BUSINESS REGULATION-RACING & ATHLETICS DIVISION	:	

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") as a Unfair Labor Practice Complaint (hereinafter "Complaint") issued by the Board against the State of Rhode Island, Department of Business Regulations, Racing & Athletics Division (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated February 5, 2004 and filed on February 12, 2004 by the Union.

The Charge alleged violations of R.I.G.L. 28-7-13 (3) (6) and (10).

> "The Employer on or about January 28, 2004 notified members of the bargaining unit that their terms and conditions of employment were to be changed immediately. Employees affected by this change are Lauri DeMayo and Barry Mollo. Non-members of this bargaining unit, William DeLuca is performing union work in violation of R.I.G.L. 28-7-13."

Following the filing of the Charge, an informal conference was held on April 5, 2004. The Board issued its Complaint on February August 12, 2005. The Employer failed to file any written answer to the complaint. The Board initially scheduled a formal hearing for October 2004, but the matter was continued at the request of the parties until February 3, 2005. Representatives from both the Union and the Employer were in attendance and had full opportunity to present evidence and to examine and cross-examine witnesses. A second formal hearing was cancelled by the parties who stipulated to exhibits and a briefing schedule. On August 9, 2005, the Board amended its complaint to

correct a scrivener's error which had numerically omitted subsection (6) of R.I.G.L. 28-7-13. The original complaint, however, did allege a unilateral change in terms and conditions of employment and the matter was in fact litigated by the parties. On August 16, 2005, the Board received the Employer's answer to the amended complaint, as well as a motion to file a supplemental brief. The Board granted the motion for supplemental briefs. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony and evidence presented and arguments contained within all of the post hearing briefs.

FACTUAL SUMMARY

The Union presented the testimony of Laurie DeMayo, an employee within the Division of Racing & Athletics since 1993. At the time of her testimony, Ms. DeMayo was employed as a "Pari-Mutuel Operations Specialist" (hereinafter "PMOS"), assigned to both Newport and Providence. She testified that while in that position, she worked a flexible schedule. (TR. pgs. 6,7) Sometime in February 2004, Ms. DeMayo was notified in the middle of a work day by her immediate supervisor, Mario Forte, that effective immediately, her work locations would now be Lincoln and Providence. (TR. p. 7)

Ms. DeMayo testified that prior to her re-assignment, there were many occasions when she would work at night or on weekends at professional boxing or wrestling events. (TR. p. 11) She also testified that there were many occasions when she would stay late in Newport to facilitate licensing and that she had the flexibility to adjust her work hours to leave earlier on other days to make up for the days on which she stayed late. She also testified that after she was re-assigned to Lincoln exclusively, she was ordered to conform her work schedule to that of the rest of the department, from 8:30 am to 4:00 pm Monday through Friday.

Ms. DeMayo also testified that on or about February 1, 2005, at a meeting in which she learned that Jeff Greer was now responsible for the Division of Racing & Athletics, she asked Mr. Greer whether he knew about the upcoming formal hearing at the labor board. He indicated that he was not aware of it and asked the nature of the charges and further inquired whether the matter could be

postponed in order to afford him the opportunity to possibly resolve the issue. The Union business agent was not present at this meeting.

The Union also presented the testimony of Barry Mollo, also a long-time employee of State and of the Division of Racing & Athletics, assigned to its Lincoln facility. Mr. Mollo testified that early in February 2004, he was called into Providence to meet with Mario Forte, the Associate Director, who told Mollo that he had one or two hours to gather his things and report to Newport for work. Mr. Forte informed Mr. Mollo that Mollo was already supposed to have been down in Newport that day. Mr. Mollo had no prior knowledge about any impending transfer, but immediately did as he was told.

Mr. Mollo testified that both immediately prior to his transfer and for the preceding 12 - 15 years, he worked a non-standard work schedule, due to the professional boxing and wrestling events which took place in the evenings and weekends. He also testified that on Fridays, he worked a double shift and then all day Saturday, with a regular day off during the week.

Mr. Mario Forte, the retired Associate Director of the Division of Racing and Athletics was also called to testify by the Union. He testified that in February 2004, he was instructed by Anthony Arico, the Deputy Director of the Department of Business Regulation, to transfer Laurie DeMayo from Newport to Lincoln. Ms. Forte further testified that Mr. Arico stated that he was "very troubled", "very uncomfortable with it", but that he had been ordered by the Director, Marilyn Shannon McConaghy to transfer both DeMayo and Mollo immediately. Mr. Forte testified that no reason was given to him for the transfer and that Mr. Arico granted him permission to discuss the issue directly with the Director McConaghy. Mr. Forte testified that Ms. McConaghy ordered Forte not to notify the Union concerning the transfer. Mr. Forte also testified that for a period of approximately three weeks thereafter, the Director couldn't make up her mind about where DeMayo was supposed to permanently work and that she kept changing her mind.

The Employer chose not to present any witness testimony. Therefore, all the testimony by the witnesses for the Union is uncontroverted.

DISCUSSION

The facts in this case are essentially undisputed. The Union argues that the Employer was obligated, under law, to give the Union advance notice of the Employer's intent to transfer the Employees. In its brief, the Union specifically states that "there is not, nor has there ever been, nor will there ever be an argument in this case that the employees cannot be transferred within a department." The Union argues that changing someone's job location by thirty or forty miles is clearly a condition of employment which must be negotiated.

The Employer's defends against the charges regarding the transfer of the employees and the reassignment of certain duties as a valid exercise of the management rights clause under the collective bargaining agreement.[1] The Employer also argued that these "changes" did not require prior bargaining with the union. Finally, the Employer also argued that the charge of direct dealing, especially as it pertains to the discussion with Mr. Greer, should be dismissed.

The Board agrees that the discussion with Mr. Greer, which was precipitated by an inquiry by Ms. DeMayo, was a harmless exchange of information at best, and cannot be construed as "direct dealing" as that term is understood within the realm of labor relations. Additionally, it should also be understood that this comment was made only a few days before the hearing in this matter and was certainly not part of the scope of the charges originally alleged.

The testimony in this matter is uncontroverted that in February 2005, the Employer ordered the immediate physical transfer of two employees within the Division of Racing and Athletics and that the Associate Director charged with effectuating the transfers was specifically ordered not to give the Union advance notice of the transfer. The question is whether or not these actions violated R.I.G.L. 28-7-13 (3) (6) and (10).

The parties submitted the collective bargaining agreement ("CBA") as a Joint Exhibit in this matter. The Employer argues that under the management

[1] All of the discussion and argument relative to the scope of duties assigned to DeMayo and Mollo after their transfers are irrelevant to the issue presented in this case. The Employer is absolutely correct in stating that it retains the exclusive management right to set its own priorities as to the work to be performed and that it doesn't have to bargain with the Union when it changed the work assignments and or priorities.

rights clause, Article II, Section 2.1, it retains the exclusive right to transfer employees. As such, the Employer argues that since it already negotiated the exclusive right to transfer, then it is not obligated to bargain further during the term of the contract. Section 2.1 provides:

> "Subject to the terms and conditions of this Agreement and applicable law, it is understood and agreed that the Director shall have the sole jurisdiction over the management of operations including but not limited to the work to be performed, the scheduling of work, the establishment of shifts and hours of work, the promotion of employees, fixing and maintaining standards of quality of work, methods of operations, the right to hire, transfer, discipline or discharge for just cause and layoff because of work or other legitimate reasons."

The collective bargaining agreement also contains a provision pertaining to hours of work, Article IV, Section 4.3 which states:

> It is hereby agreed that there shall be a basic work week as follows:
>
> 1. A 35 hour work week (five consecutive seven hour days) Monday through Friday, exclusive of unpaid lunch period. *
>
> *Refer to "Global Agreement" dated August 29, 1996 which is incorporated herein and made a part of this agreement.
>
> 2. "It is recognized that there are now other work schedules peculiar to certain classes of positions which are recognized by the State and the Union and such exceptions shall remain in full force and effect. All work days and work hours shall not be changed until first discussed with the Union. In the event it becomes necessary to make any changes in any area, the parties hereto shall make every effort to agree mutually on said changes subject to the grievance procedure and arbitration provision of this agreement."

While it is a little unusual for the Board to review the provisions of a collective bargaining agreement, in this case, it is necessary to determine whether the Employer agreed within the scope of its contract to engage in further bargaining on any particular issue, especially prior to implementing a unilateral decision. The Employer argued that the employees in question, DeMayo and Mollo, were both working "off hours" and that the Employer had every right to adjust both their hours and locations of work, but also the priority of the duties assigned. The Employer also argued that there was no evidence that DeMayo's and Mollo's "flex-time" was anything except a "loose, informal arrangement which higher levels of management did not know about and had not approved" or that the "flex time arrangements were established hours of work which were accepted and or negotiated by the union." The Employer also argued that there was no

showing that either management or the union "recognized" DeMayo's and Mollo's "make it up as you go along" arrangements prior to their transfers.

The Board has a hard time understanding how the Employer could argue that no one in higher level of management knew that these employees were working a non standard *schedule* which included nights and weekends at the professional boxing and wrestling events. Such an assertion especially rings hollow when this Board is aware that state employees are required to complete time sheets attesting to their days and hours of work.[2] Who did the Employer think was providing these services to the state? Moreover, Mr. Mollo testified that he had been working this schedule for *at least a dozen years*; was no one in management aware as to who was running the boxing and wrestling shows?

The Employer argued that the CBA expressly provides that the workweek of the PMOS is 35 hours and that the Department's 8:00 am to 4:00 schedule is the established schedule for the Department of Business Regulation. The Employer also argued that there was no evidence that DeMayo and Mollo never worked these hours or that the union had negotiated hours which varied from the Department's established schedule. The Employer's focus on these arguments is misplaced. The point here is not that the Department has adopted a regular business schedule or that DeMayo and Mollo were transferred or even had various priorities in their duties reassigned. The point is that the parties agreed, pursuant to Article IV, Section 4.3.2 that work days and work hours of work schedules peculiar to certain classes of positions shall not be changed until first discussed with the Union. To the Board, this provision very simply and directly mandates discussion prior to a unilateral implementation to a change in work days and hours. This provision then imposes a requirement to bargain in good faith. The failure to take this step of discussion then is in violation of R.I.G.L. 28-7-13 (6), as alleged, and the Board so finds. If the Employer has simply first discussed the changes, then it would have been in the clear. After discussing the changes, if the Union still felt aggrieved, it would have been left to the grievance and arbitration process. The fact that the Employer refused to bargain in good

[2] Although there was no testimony in this particular case stating that employees are required to complete time sheets, the Board will take "judicial notice" of this fact, since it is aware of this well known fact.

faith by discussing the changes prior to unilateral implementation for these employees who were working a non-standard schedule leaves it in violation of the State Labor Relations Act.

FINDINGS OF FACT

1) The Respondent is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection; and, as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.
3) The Employer and Union are parties to a collective bargaining agreement (CBA). The management rights clause of the agreement provides: "Subject to the terms and conditions of this Agreement and applicable law, it is understood and agreed that the Director shall have the sole jurisdiction over the management of operations including but not limited to the work to be performed, the scheduling of work, the establishment of shifts and hours of work, the promotion of employees, fixing and maintaining standards of quality of work, methods of operations, the right to hire, transfer, discipline or discharge for just cause and layoff because of work or other legitimate reasons."
4) The CBA also contains the following provision:

   It is hereby agreed that there shall be a basic work week as follows:

   (1) A 35 hour work week (five consecutive seven hour days) Monday through Friday, exclusive of unpaid lunch period. *

   *Refer to "Global Agreement" dated August 29, 1996 which is incorporated herein and made a part of this agreement.

   2. "It is recognized that there are now other work schedules peculiar to certain classes of positions which are recognized by the State and the Union and such exceptions shall remain in full force and effect. All work days and work hours shall not be changed until first discussed with the Union. In the event it becomes necessary to make any changes in any area, the parties hereto shall make every effort to agree mutually on said changes subject to the grievance procedure and arbitration provision of this agreement."

5) Both Laurie DeMayo and Barry Lollo are long-time employees of the Division of Racing & Athletics and both hold the title of "Pari-Mutuel Operations Specialist."

6) In early February 2004, the Director of the Department of Business Regulation, Marilyn Shannon McConaghy issued an order directing the immediate transfer of the assigned work locations for both Ms. DeMayo and Mr. Mollo. Ms. McConaghy also issued an order that the Union not be advised of these transfers. The transfers were effectuated within hours.

CONCLUSIONS OF LAW

1) The Union has proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (6).

2) The Union has not proven by a fair preponderance of the credible evidence that the Employer has committed a violation of R.I.G.L. 28-7-13 (3).

ORDER

1) The Employer is hereby ordered to post a copy of this decision and order for a period of thirty (30) days on all employee bulletin board utilized for employment notices within the Department of Business Regulation.

RHODE ISLAND STATE LABOR RELATIONS BOARD

Walter J. Lanni, Chairman

Joseph V. Mulvey, Member

Ellen L. Jordan, Member (Dissent)

John R. Capobianco, Member

Elizabeth S. Dolan, Member (Dissent)

GERALD GOLDSTEIN, MEMBER, ABSTAINED FROM VOTING IN THIS MATTER.

FRANK MONTANARO, MEMBER, ABSTAINED FROM VOTING IN THIS MATTER.

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: 3-14, 2006

By: ROBYN H. GOLDEN RHG
Robyn H. Golden, Administrator

ULP-5711

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NOTICE OF RIGHT TO APPEAL AGENCY DECISION PURSUANT TO R.I.G.L. 42-35-15

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of ULP No. 5711 dated March 14, 2006, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after March 14, 2006.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: March 14, 2006

By: Robyn H. Golden RHG
Robyn H. Golden, Administrator